No. 84-677

Supreme Court, U.S.
FILED
OCT 29 1984
ALEXANDER L. STEVAS
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

AMERICAN TRUCKING ASSOCIATIONS, INC., TIDEWATER MOTOR TRUCK ASSOCIATION, HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION, INTERNATIONAL ASSOCIATION OF NVOCCS, AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent and Petitioner,*

*vs.*

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

WILLIAM H. TOWLE
*Attorney for Petitioner, American Warehousemen's Association*

HERRICK, PEREGRINE, TOWLE & HOWIE
400 Lathrop Avenue
River Forest, Illinois 60305
Telephone: (312) 771-6330
*Of Counsel*

Pandick Midwest, Inc., Chicago • 454-7600

## QUESTIONS PRESENTED

1. Was the Circuit Court correct in overturning the NLRB decision, based on established principals, that the Rules on Containers were an attempt by the ILA to unlawfully acquire work traditionally done by public warehousemen?

2. Did the NLRB, as affirmed by the Circuit Court, correctly find the balance of the Rules on Containers to be lawful work preservation?

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Questions Presented | i |
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Statutes Involved | 3 |
| Statement of the Case | 3 |
| Reasons For Granting The Writ | 6 |
| 1. THE DECISION BELOW WOULD EFFECTIVELY ELIMINATE THE "NEW TECHNOLOGY EXCEPTION" TO THE "WORK PRESERVATION DOCTRINE" WHERE THE INNOVATION IS ONE INVOLVING A NEW SYSTEM OR CONCEPT. SUPREME COURT REVIEW IS REQUIRED TO ESTABLISH THE PROPER APPLICATION OF THE EXCEPTION AS IT APPLIES TO THE CREATION OF A NEW SYSTEM THAT INCORPORATES MANY OF THE FUNCTIONS OF THE OLD METHODS BUT IN A NEW, HIGHLY BENEFICIAL WAY | 6 |
| 2. THE FOURTH CIRCUIT ERRONEOUSLY REVERSED THE NLRB IN THE LIMITED AREA WHERE THE BOARD HAD APPLIED THE "NEW TECHNOLOGY EXCEPTION" TO THE WORK PRESERVATION RULE, NAMELY CERTAIN LIMITED WAREHOUSE AND TRUCKER FUNCTIONS | 7 |
| Conclusion | 9 |

## TABLE OF CASES

PAGE

*Associated General Contractors of California, Inc.* v. *NLRB*, 514 F.2d 433 (C.A. 9, 1975) ..... 6

*Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178 (C.A. 2, 1976) ..... 6

*NLRB* v. *International Longshoremen's Ass'n.*, 447 U.S. 490 (1980) ..... 3, 4

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

---

AMERICAN TRUCKING ASSOCIATIONS, INC., TIDEWATER MOTOR TRUCK ASSOCIATION, HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION, INTERNATIONAL ASSOCIATION OF NVOCCS AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

*Petitioners,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent and Petitioner,*

*vs.*

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

*Respondents.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

Petitioner, AMERICAN WAREHOUSEMEN'S ASSOCIATION, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

That judgment found that the Rules on Containers (the Rules) negotiated between the International Longshoremen's Association (ILA) and various employer associations representing east coast shipping lines did not violate the secondary boycott proscriptions of sections 8(e) and 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. §§ 158(e) and 158(b)(4)(B), and were valid in all respects.

That judgment (a) reversed that part of the Decision of the National Labor Relations Board (NLRB) that had held the Rules did violate the secondary boycott proscriptions to the extent they infringed on traditional functions performed by public warehousemen and truckers and (b) upheld the remainder of the NLRB Decision that the balance of the Rules were lawful.

## OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It is set forth in the Joint Appendix which is being filed with the Petition of the American Trucking Associations.

The opinion of NLRB is also set forth in the Joint Appendix which is being filed with the Petition of the American Trucking Associations.

## JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and filed on May 9, 1984 and Petitions for Rehearing were denied on July 31, 1984. The jurisdiction of this Court if invoked under 28 U.S.C. § 1254(1).

A petition for a Writ of Certiorari is being filed by American Trucking Associations. It is requested that the instant petition be consolidated for consideration with that of the American Trucking Associations.

## STATUTES INVOLVED

The relevant statutes are set forth in the Joint Appendix filed with the Petition of the American Trucking Associations, and are sections 8(e) and 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(e) and 158(b)(4)(B).

## STATEMENT OF THE CASE

This case culminates over a dozen years of litigation, including one prior trip to this Court, over the lawfulness of the Rules on Containers.

The concept of freight containerization as a system designed to eliminate inefficiencies was introduced in the late 1950's. Instead of loading individual shipments aboard a ship, many separate shipments could be loaded at point of manufacture or storage into a single container which would then be handled mechanically from origin to ultimate destination. No intermediate manual handling was required.

This Court recognized the benefits of the concept of containerization as follows:

> The use of containers is substantially more economical than traditional methods of handling ocean-borne cargo. Because cargo does not have to be handled and repacked as it moves from the warehouse by truck to the dock, into the vessel, then from the vessel to the dock and truck or rail to its destination, the costs of handling are significantly reduced. Expenses of separate export packaging, storage, losses from pilferage and breakage, and costs of insurance and processing cargo documents may also be decreased. Perhaps most significantly, a container ship can be loaded or unloaded in a fraction of the time required for a conventional ship. As a result, the unprofitable in-port time of each ship is reduced, and a smaller number of ships are needed to carry a given volume of cargo.
>
> *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. at 494-95 (footnotes omitted).

The result of containerization was a reduction in the volume of cargo to be loaded into the holds of ships by longshoremen. Labor problems were thus precipitated and culminated in the negotiation of the Rules on Containers which essentially provided that if containers owned or leased by the shipping companies were to be stuffed or stripped within a 50 mile radius of a port by anyone other than employees of the beneficial owner of the cargo such work had to be done at the pier by ILA labor, except for import containers loaded only with goods owned by one shipper and warehoused for at least 30 days.

The NLRB held that the Rules violated the NLRA's proscriptions against secondary activity. In *NLRB* v. *International Longshoremen's Ass'n*, 447 U.S. 490 (1980) a sharply divided Court concluded that the NLRB's definition of the work in controversy "reflect(ed) a fundamental misconception of the work preservation doctrine" and was consequently "erroneous as a matter of law." 447 U.S. at 507, 511 n.26. The case was remanded with instructions to the NLRB to reconsider the unfair labor practice complaints in light of the principals set forth by the Court.

The Chief Justice, joined by three Justices, dissented, expressing the view that the Rules in seeking to control the stuffing and stripping of containers away from the pier were invalid under sections 8(e) and 8(b)(4)(B) of the NLRA.

On remand the NLRB found that the Rules sought to preserve work for longshoremen which was historically and functionally related to their traditional, pre-containerization work. Also, the shipping companies had the right to control who loaded freight into their containers. Consequently, the Rules were acceptable work preservation measures and not in violation of the secondary boycott provisions of the NLRA.

The work preservation justification for the Rules was not, however, found applicable to certain functions of public warehousemen and truckers, namely those which had traditionally been performed by warehouse and trucking labor prior to containerization.

The Fourth Circuit Court of Appeals held that the NLRB had misapplied the doctrine of work preservation in concluding that the Rules were unlawful with respect to warehousing and trucker functions, but had correctly applied the doctrine to the balance of the Rules. Thus it held that the Rules were lawful in their entirety.

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW WOULD EFFECTIVELY ELIMINATE THE "NEW TECHNOLOGY EXCEPTION" TO THE "WORK PRESERVATION DOCTRINE" WHERE THE INNOVATION IS ONE INVOLVING A NEW SYSTEM OR CONCEPT. SUPREME COURT REVIEW IS REQUIRED TO ESTABLISH THE PROPER APPLICATION OF THE EXCEPTION AS IT APPLIES TO THE CREATION OF A NEW SYSTEM THAT INCORPORATES MANY OF THE FUNCTIONS OF THE OLD METHODS BUT IN A NEW, HIGHLY BENEFICIAL WAY.

Both the NLRB and the Fourth Circuit decisions misapplied the "new technology exception" to the work preservation doctrine. Central to their error was their failure to appreciate that a new concept or system, such as containerization, is not the same type of technological advance that was involved in the creation of the "new technology exception" to the work preservation justification.

The new technology exception was developed in Circuit Court decisions that involved new products, namely sophisticated mechanisms on surgical scrub stations in *Associated General Contractors of California, Inc.* v. *NLRB*, 514 F.2d 433 (C.A.9, 1975) and an integrated plenum in air conditioning units in *Carrier Air Conditioning Co.* v. *NLRB*, 547 F.2d 1178 (C.A.2, 1976).

Obviously, the doctrine must not be confined to the narrow limits of products and devices. Clearly some of the most beneficial new advances are in the field of concepts and systems. New ways of combining old functions to create enormous savings and benefits must be accorded the same protection as adding a new plenum at the factory.

How the doctrine should be applied to the creation of a new system is a decision this Court should address. The NLRB and Fourth Circuit segregated one function of the integrated system, loading and unloading freight. They concluded that since this function still had to be done, and prior to the development of the new system longshoremen had done it, there was no new technology to be protected. This approach ignores the very basic purposes and benefits of containerization as a new system, namely control over freight from one designated origin to one destination.

The Supreme Court has not addressed itself to the application of the "new technology exception" to the doctrine of work preservation. Given the recognized magnitude of the issues here involved, it is wholly appropriate that this case be accepted by the Court to review the narrow, inappropriate application of the exception by the NLRB and the Fourth Circuit.

2. THE FOURTH CIRCUIT ERRONEOUSLY REVERSED THE NLRB IN THE LIMITED AREA WHERE THE BOARD HAD APPLIED THE "NEW TECHNOLOGY EXCEPTION" TO THE WORK PRESERVATION RULE, NAMELY CERTAIN LIMITED WAREHOUSE AND TRUCKER FUNCTIONS.

The Board ruled that the new technology of containerization had eliminated certain longshoremen's jobs and that work preservation, because the jobs were technologically eliminated, would not justify the attempt of the Rules to force warehousemen and truckers to return such functions to the longshoremen.

These limited warehouse and trucker functions were properly held by the NLRB to be jobs the longshoremen could not seek to recapture since the new technology eliminated the jobs and work preservation was unwarranted. The Fourth Circuit reversal of that holding sharply frames the question of the reach of the new technology exception.

The focus of the decision is upon the effect of new technology upon the work acquisition defense. Once again this is an area the Supreme Court has not considered in the context of a fundamental new system such as containerization.

It is, however, an area which the Court should review. This proceeding is the vehicle to undertake that review. It involves a proceeding that this Court has already recognized as being of great significance. It clearly delineates the issues, in both the NLRB's failure to apply the exception to all of the functions embraced within the new system, and in the Fourth Circuit's rejection of the exception in the limited area in which the NLRB had properly applied it.

Henry Ford would have had to take apart and reassemble the cars he made on his new assembly line if the Fourth Circuit reasoning were applied. As the new technology exception was limited and circumscribed in its application to containerization the results were as inappropriate.

Only a Supreme Court definition of the proper reach of the "new technology exception" to the area of new systems and concepts will properly allow the implementation of new systems in harmony with the clashing objectives of those employed by the new system and those displaced from their old work.

## CONCLUSION

It is vitally important to articulate the extent to which jobs made obsolete by the technology of a new system or concept may nevertheless be subject to a union's secondary activity in the nature of work preservation. The instant application of lower court decisions was wrong, bad policy and if allowed to stand unreviewed, a mischievous precedent.

The petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

WILLIAM H. TOWLE
*Attorney for Petitioner, American Warehousemen's Association*

HERRICK, PEREGRINE, TOWLE & HOWIE
400 Lathrop Avenue
River Forest, Illinois 60305
Telephone: (312) 771-6330
*Of Counsel*